Neutral Citation: [2024] UKFTT 001075 (TC)

Case Number: TC09366

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/08249

INCOME TAX – discovery assessment – HICBC – refund of tax

Heard on: 1 October 2024
Judgment date: 28 November 2024

Before

TRIBUNAL JUDGE MCGREGOR
DR CAROLINE SMALL

Between

LYNSEY LAPSLEY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Lapsley represented herself

For the Respondents: Anika Aziz, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) via Teams. A face to face hearing was not held because a remote hearing was appropriate.

2. The documents to which we were referred are a specific document bundle of 225 pages and a generic bundle of 865 pages.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

4. This is an appeal against a discovery assessment for the 2018-19 tax year in the amount of £8,630.92.

LAW

5. The main area of relevance for this appeal are the provisions regarding discovery assessments.

6. HMRC have the power to raise a discovery assessment under section 29 of the Taxes Management Act 1970 (TMA 1970).

7. Section 29(1) provides for HMRC to raise an assessment with regards to a taxpayer in a number of circumstances, including, under sub-paragraph (b) where the assessment that the taxpayer has included in their self-assessment return turns out to have been too low. This sub-section reads as follows:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> > (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
> >
> > (b) that an assessment to tax is or has become insufficient, or
> >
> > (c) that any relief which has been given is or has become excessive,
> >
> > the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

8. Section 29(3) provides that, where a taxpayer has submitted a self-assessment tax return, HMRC can only raise a discovery assessment where certain conditions have been met. This sub-section reads as follows:

> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> > (a) in respect of the year of assessment mentioned in that subsection; and
> >
> > (b) in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

9. The first condition is not relevant to this case, because HMRC are not asserting any careless or deliberate behaviour on the part of Ms Lapsley.

10. The second condition is provided in sub-sections 5 and 6, which read as follows:

> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> ….
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;
>
> (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;
>
> (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or
>
> (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—
>
> (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
>
> (ii) are notified in writing by the taxpayer to an officer of the Board.

11. This condition means that HMRC can only raise a discovery assessment if, at the time of the closure of the enquiry window (which is broadly speaking a year after the submission of the return), HMRC had available to it all the information that would have enabled the officer to make the assessment at that point. However, "available to HMRC" has a very specific meaning provided in sub-section 6, which requires that the information has to have been available in specific places or by specific means.

12. The ability of HMRC to raise assessments under section 29 TMA is also subject to time limits. For the purposes of this appeal, the relevant time limit is set out in section 34 as follows:

> "34(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains

> tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.
>
> 34(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.
>
> …"

13. For completeness, we also note the background relevance of Higher Income Child Benefit charge (HICBC). In relation to assessments under section 29 TMA to collect the HICBC, a series of decisions relating to an appeal brought by Mr Jason Wilkes (ultimately confirmed by the Court of Appeal in *HMRC v Wilkes* [2022] EWCA Civ 1612 ('Wilkes CA')) held that the HICBC was "neither 'income' nor even charged on income" nor was it "income which ought to have been assessed to income tax" or an "amount which ought to have been assessed to income tax" (see Wilkes CA at [29]). Accordingly, the HICBC could not be assessed under section 29(1)(a) TMA.

14. Section 29 TMA 1970 was amended by the Finance Act 2022 ('FA 2022') in order to reverse the decisions in the Wilkes cases and allowed HMRC to make discovery assessments, subject to the usual conditions, in relation to the HICBC and some other things.

15. This new wording had retrospective effect to tax year 2020-21 provided certain conditions were met.

FACTS

16. We find the following facts from the evidence presented to us. Some of the facts presented here are not directly relevant to the appeal at hand but are helpful to understand the context of the appeal.

17. Ms Lapsley claimed child benefit for her children for many years, commencing in 2008.

18. She had been unaware of the concept of the Higher Income Child Benefit Charge (HICBC) until October 2019, when HMRC sent her a letter about it.

19. HMRC issued discovery assessments amounting to £3,849 covering three tax years – 2015-16, 2016-17 and 2018-19 in February 2020. These assessments were to collect the HICBC charge that had accrued in those years as a result of Ms Lapsley's income exceeding the threshold for HICBC to apply.

20. Ms Lapsley appealed against these assessments to HMRC in March 2020. Following a process of HMRC internal review, which upheld the assessments, Ms Lapsley then appealed to this Tribunal in October 2020. That appeal was designated TC/2020/03456.

21. That appeal was stayed behind the case of *Wilkes*, which reached its conclusion in the Court of Appeal in November 2022. Following HMRC's loss at the Upper Tribunal stage, in January 2022, HMRC dealt with Ms Lapsley's outstanding discovery assessments as follows:

(1) 2015-16 discovery assessment for £273 was cancelled – meaning that no tax was due for that year in relation to HICBC;

(2) 2016-17 discovery assessment for £1788 was cancelled – meaning that no tax was due for that year in relation to HICBC;

(3) 2017-18 discovery assessment for £1788 was cancelled, but the letter cancelling the assessment was accompanied by an invitation for Ms Lapsley to settle the liability

or, if she decided not to take that option, for a notice to file a self-assessment to be issued.

22. In relation to 2017-18, Ms Lapsley did not take the option to settle the liability, because she did not understand what that meant. HMRC then issued her a notice to file a self-assessment for that year on 11 February 2022.

23. Ms Lapsley filed her 2017-18 tax return on 4 March 2022. This return showed a tax amount due of £1788, being the amount of HICBC. Ms Lapsley included a statement in the return that explained that she did not understand why she needed to complete the return.

24. Turning to the 2018-19 tax year. Ms Lapsley had been employed during the year and paid her tax through PAYE, but was made redundant during the course of that year.

25. Following a conversation with a colleague who had also been made redundant that year, who had explained that they had been able to recover some of the PAYE from HMRC, on 14 October 2019, Ms Lapsley called HMRC and explained that she had been made redundant and that she thought she might have overpaid tax during the year as a result. HMRC agreed and issued a refund direct to Ms Lapsley of £8,630.92. There is no dispute that, on the basis of the PAYE position alone, Ms Lapsley was entitled to that refund.

26. On 13 February 2020, HMRC issued Ms Lapsley a notice to file a tax return for the tax year 2018-19.

27. On 14 August 2020, Ms Lapsley submitted her 2018-19 self-assessment tax return. She included the amount of the HICBC charge, but not the refund she had already received in respect of that tax year.

28. The submission of the return generated an additional refund of £6,809.82. This was not paid to Ms Lapsley, but was used by HMRC to set-off against tax bills that were, as at that date, considered outstanding - including the £3,849 due under discovery assessments for the tax years 2015-16 through to 2017-18, which were, at that time, still outstanding as they had not been cancelled until January 2022.

29. In July 2021, a payment of £2,893 was paid to Ms Lapsley as partial payment of that refund. She called HMRC to question what the purpose of that payment was, particularly as she was still waiting on the other appeal, but did not understand the response that she got, other than confirmation from HMRC that she was entitled to the refund.

30. Starting in October 2022, Ms Lapsley was paying £83.28 per month under a time to pay arrangement, apparently relating to outstanding HICBC. She had set this up in agreement with HMRC because they had told her that she had tax to pay, but she did not understand what she was paying towards.

31. On 13 October 2022, HMRC sent Ms Lapsley a letter explaining that they had reviewed her tax return and found that the refund was missing and that they would, absent any further information, raise an assessment for the relevant amount.

32. Ms Lapsley called HMRC to discuss the matter on 20 October 2022.

33. On 21 November 2022, the discovery assessment was notified to Ms Lapsley by letter.

34. Following an internal review, the review conclusion letter, which upheld the discovery assessment, was issued to Ms Lapsley on 3 May 2023.

35. Ms Lapsley lodged her appeal to this Tribunal on 24 May 2023.

PARTIES ARGUMENTS

36. HMRC's position is that:

(1) Officer Wallace made a valid discovery of an underpayment of tax by virtue of establishing that a refund had been paid to Ms Lapsley but not included on the return; and

(2) The discovery assessment was issued in time and in accordance with the statutory conditions, in particular:

(a) It was issued in the normal 4 year time limit;

(b) Officer Wallace could not have been reasonably expected, on the basis of the information made available to him before the end of the enquiry window, to have been aware of the insufficiency of tax.

37. With regard to the underpayment of tax, HMRC explains that:

(1) When Ms Lapsley completed her 2018-19 return, she failed to include the fact that she had received the PAYE refund of £8,630.92 in relation to that tax period;

(2) Therefore, when the tax was calculated according to the information included in the return, it generated a refund of £6,809.82 to Ms Lapsley which was not in fact due to her.

(3) If Ms Lapsley had correctly completed the return, including both the HICBC charge and the PAYE refund, it would have generated an obligation on Ms Lapsley to make a payment of £1,821.10.

38. Ms Lapsley submits that:

(1) HMRC's actions over the last 8 years have been unfair and put her under significant distress;

(2) She has never knowingly overclaimed either child benefit or any tax refunds;

(3) HMRC have all the information on her income over the years and should have informed her sooner of the concerns over HICBC;

(4) Nothing was ever explained to her properly;

(5) Billboard campaigns to explain HICBC were not enough to make taxpayers aware of the consequences of HICBC;

(6) She received a series of letters over the years which were complex and caused huge confusion;

(7) Despite explaining the consequences on her health and wellbeing, she received no real additional support from HMRC;

(8) She has been accused of dishonesty and been fined and chased for money but doesn't understand what it is for;

(9) She doesn't believe that she owes anything to HMRC.

DISCUSSION

39. It was clear from the hearing that Ms Lapsley had been in a state of confusion and stress throughout the process, starting from late 2019 through to the hearing itself.

40. The confusion started with her lack of knowledge of HICBC, but was substantially exacerbated by the various technical steps that occurred after that point, in particular the impact of the Wilkes case on earlier periods. There is no doubt that, for someone who has never had any prior reason to be involved in self-assessment, the process of discovery assessments, appeals, stays, withdrawals of assessments and the requirement to complete self-

assessment returns, as well as letters referring to penalties, interest, recovery of debt due had, in this case, put considerable strain on Ms Lapsley.

41. We note that HMRC are no longer pursuing penalties for careless inaccuracy in this case, however some of the language used in correspondence and in the Tribunal had led Ms Lapsley to believe that she was being accused of careless or deliberate error. We note that the assessment raised by HMRC that is being dealt with in this appeal does not include any accusation of dishonest or careless behaviour. It concerns only the collection of the correct amount of tax for the 2018-19 tax year.

42. We note Ms Lapsley's comments about HICBC and the way that HMRC have dealt with its application to those whose children were born before HICBC came into force. However, since Ms Lapsley now accepts that she was, in 2018-19, liable for HICBC and included the correct amount in respect of it on her return for that year, we do not consider these points further in this decision.

43. We also note Ms Lapsley's comments regarding HMRC's treatment of her during the course of events that has led to this appeal.

44. The scope of what we need to decide is, in fact, quite narrow. We need to establish whether HMRC's assessment of £8,630.92 from Ms Lapsley in relation to the 2018-19 tax year has been validly issued in accordance with the law and whether it has been correctly calculated.

45. In terms of validity of the discovery assessment process itself. We heard evidence from Officer Wallace.

46. From this evidence, it was clear that Mr Wallace had commenced an enquiry into the 2018-19 tax return because it had generated a refund. He explained that this was out of the ordinary for taxpayers who had been brought into the self-assessment process purely because they fell within HICBC. For most such taxpayers, the submission of the return generates a payment due of the amount of the HICBC.

47. When he opened the enquiry, Mr Wallace considered other records available within HMRC, including Ms Lapsley's PAYE records, and established that she had already received a refund, but that this had not been recorded on the tax return later submitted.

48. We find that Mr Wallace developed a belief that this information pointed him in the direction of an insufficiency of tax and that this was a reasonably held belief based on the information available. Therefore we accept that a discovery of an insufficiency of tax had been made in accordance with section 29(1)(b) of TMA 1970.

49. However, since Ms Lapsley submitted a return, we must also be satisfied that the in accordance with section 29(5), Mr Wallace could not reasonably have been expected to be aware of the insufficiency of tax prior to the closure of the enquiry window.

50. We must consider whether the fact that Ms Lapsley had received a PAYE refund was "information made available" under section 29(6).

51. The relevant paragraph for us to consider is paragraph (b) – was Ms Lapsley's phone call to HMRC in October 2019 a "claim" made to HMRC and therefore the existence of the refund was treated as having been "made available" to HMRC.

52. We are not aware of any authorities concerning the meaning of claim in this context. Therefore we must apply its normal meaning in the context it is used.

53. Section 29 sits within a part of TMA 1970 called "Assessments and claims". Section 42 sets out the procedure for making "claims". It does not further define claims, save for certain

specified types of claim. It provides that claims must, if a person has been issued a notice to file a return, be included in that return. If the person has not been issued a notice to file a return, then the claim must be made in accordance with the provisions of schedule 1A to TMA 1970. The application for a refund was clearly not made in a tax return. Those made outside of the return must be made in such form as HMRC prescribe and include, for example, a declaration of accuracy.

54. In our view, the phone call that Ms Lapsley made and the refund she received in October 2019 should not be classified as a "claim" within those provisions that would render it information that was "made available".

55. Therefore, we find that the conditions for issuing a discovery assessment have been met.

56. We now turn to the calculation of the amount on in the discovery assessment.

57. It is important to explain how the figure of £8,630.92 for the discovery assessment has been arrived at.

58. If Ms Lapsley had completed her tax return for the 2018-19 year without having first received the PAYE refund, the return would have been correct and it would have generated a refund to her of £6,809.82.

59. However, Ms Lapsley had, in fact, already received a refund of £8,630.92 because she had overpaid PAYE during the year. When Ms Lapsley filled out the return, she included the amount of her income in that year and the amount of income tax that had been deducted from that income by her employer. However, she had not understood that she needed to fill out one of the boxes on the return with the amount of the refund that she had received from HMRC for the overpaid PAYE.

60. As a result, the calculation of tax had, in effect, given her credit for the originally overpaid PAYE again. Because she also owed an amount of £1788 in relation to HICBC, this reduced the amount of that credit, such that amount of overpayment calculated on the submission of her return was £8,630.92 less £1,788, which is £6,809.82.

61. However, Ms Lapsley did not receive that amount in full in cash terms from HMRC on the submission of the return. She accepts that she did receive the amount of £2,893 in 2021. HMRC submit that the remainder of this refund was used to satisfy outstanding debts owed by Ms Lapsley in relation to other tax years.

62. None of the letters that HMRC sent to Ms Lapsley explained exactly which debts had been satisfied by the remainder of £6,809.82. At the hearing, we asked Mr Wallace to try to explain what had happened, but even with his specialist knowledge of HMRC's internal workings, he admitted that it was difficult to follow how the money had been applied when looking at the latest self-assessment statement on Ms Lapsley's account. This was partly because penalties had been applied and then removed, partly because it had originally been used to set off against the discovery assessments of earlier years that were later cancelled. This was exacerbated by the fact that Ms Lapsley was, over the same period, paying monthly amounts to HMRC under a time to pay arrangement that she also did not understand.

63. This level of complexity undoubtedly contributed to Ms Lapsley's confusion and HMRC were not able to articulate exactly how much money Ms Lapsley would actually have to pay back to them if the discovery assessment was upheld.

64. However, for the purposes of this decision, we must determine whether the amount of the assessment is correct. We find, as set out above, that it does represent the insufficiency of tax contained within the tax return.

65. We would, however, recommend that, before seeking to recover the funds from Ms Lapsley, HMRC seek to provide a calculation to Ms Lapsley showing clear calculations and explanations of how the refund of £6,809.82 and the amounts paid under the time to pay arrangement were applied to Ms Lapsley's tax position and how much she is now required to pay to HMRC as a result of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 28th NOVEMBER 2024